FILED BY CLERK
FEB 10 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: DAVID STARR, Petitioner/Appellant, and KIMBERLY STARR, Respondent/Appellee.	2 CA-CV 2011-0095 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20091402

Honorable K.C. Stanford, Judge

AFFIRMED IN PART
REVERSED AND REMANDED IN PART

Pahl & Associates
By Danette R. Pahl
Tucson
Attorneys for Petitioner/Appellant

Solyn & Lieberman, PLLC
By Scott Lieberman and Melissa Solyn
Tucson
Attorneys for Respondent/Appellee

V Á S Q U E Z, Presiding Judge.

¶1 David Starr appeals from the trial court's decree of dissolution of his marriage to appellee Kimberly Starr. David argues the court abused its discretion in determining the amount and duration of spousal maintenance it awarded to Kimberly because the court failed to consider all relevant factors under A.R.S. § 25-319(B), and the factors the court specified it had considered do not support the award. For the reasons stated below, we affirm the order in part, and reverse and remand in part.

Factual and Procedural Background

¶2 We view the record in the light most favorable to upholding the trial court's decision. *Cullum v. Cullum*, 215 Ariz. 352, ¶ 9, 160 P.3d 231, 233 (App. 2007). After thirty years of marriage, David filed a petition for dissolution of marriage in April 2009. He was forty-eight years old and Kimberly was forty-nine, and the parties had two children, the younger of which turned eighteen years old while the dissolution was pending. David had been employed with Empire Southwest as a truck engineer product support manager since November 1993. With the exception of two relatively brief periods, Kimberly was self-employed, providing daycare from her home since 1986.[1]

¶3 Because the parties were unable to resolve issues of spousal maintenance, community waste, and attorney fees, the matter proceeded to trial. Before trial, David filed a motion for findings of fact and conclusions of law, pursuant to Rule 82, Ariz. R. Fam. Law P. Kimberly joined in that request. Following trial, the court issued an under-advisement ruling in January 2011, awarding Kimberly monthly spousal maintenance in

[1]In 1990, Kimberly worked at a daycare facility for about a year, and in 1998, she was employed at an elementary school for less than a year.

the amount of $2,100 indefinitely. The court attached to its ruling a "summary sheet" that contained a detailed description of the parties' income and expenses. But, asserting that "the [r]uling did not include Rule 82 findings," David asked the court to enter an order that contained specific findings of fact and conclusions of law with respect to spousal maintenance and community waste. He also objected on the same ground to the proposed decree of dissolution of marriage that Kimberly had lodged with the court.

¶4 In February 2011, the trial court issued a second ruling that addressed David's "request for Rule 82 findings." In it, the court "confirm[ed] the financial findings in the summary sheet attached to the" first ruling and made "additional findings" concerning spousal maintenance and community waste. At a hearing in March on David's objection to the proposed decree, at David's request the court stated it would include the additional findings from its second ruling in the final decree. David did not request additional or different findings of fact. In May 2011, the court signed the decree, and this appeal followed.

Discussion

¶5 David challenges the amount and duration of spousal maintenance awarded to Kimberly,[2] arguing the trial court failed to consider all relevant statutory factors in making its determination and the amount awarded was not supported by the factors the

[2]In reviewing an award of spousal maintenance, we generally apply a two-part test: first, we determine if the requesting party meets one of four criteria in A.R.S. § 25-319(A), and second, we review the amount and duration of the award to determine whether the trial court properly applied the factors in § 25-319(B). *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 15, 972 P.2d 676, 681 (App. 1998). Because David challenges only the amount and duration of the award, we do not address the court's determination under § 25-319(A).

court did consider. We review an award of spousal maintenance for an abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d 676, 681 (App. 1998). "For an abuse of discretion to exist, the record must be devoid of competent evidence to support the decision." *Platt v. Platt*, 17 Ariz. App. 458, 459, 498 P.2d 532, 533 (1972).

¶6 Section 25-319(B) provides that courts shall determine the amount and duration of spousal maintenance without considering marital misconduct and after considering all relevant factors listed therein. The factors include the following: "the standard of living during the marriage, the duration of the marriage, each spouse's age, employment history and earning ability, and the financial abilities and resources of each spouse." *Leathers v. Leathers*, 216 Ariz. 374, ¶ 10, 166 P.3d 929, 932 (App. 2007), *citing* A.R.S. § 25-319(B). This determination requires a case-by-case analysis, and all of the factors may not apply in each case. *Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993).

¶7 David argues the trial court failed to consider his ability to meet both his and Kimberly's needs, the comparative financial resources of the parties, and Kimberly's ability to meet her own needs pursuant to § 25-319(B)(4), (5), and (9), respectively. Kimberly responds that David has waived this issue on appeal and that, in any event, the court actually considered these factors in making its determination.

¶8 "In all family law proceedings tried upon the facts, the court, if requested before trial, shall find the facts specially and state separately its conclusions of law thereon . . . ." Ariz. R. Fam. Law P. 82(A). When a party makes a timely request pursuant to Rule 82, "the trial court must make findings concerning *all* of the ultimate

facts." *Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990). With respect to spousal maintenance, the court must make findings on all § 25-319(B) factors that are supported by the evidence presented by the parties. *Id*. at 134, 796 P.2d at 936. However, parties must object to inadequate findings of fact and conclusions of law so the court has an opportunity to correct them, and "[f]ailure to do so constitutes waiver." *Id.*; *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994). Although David initially challenged the sufficiency of the court's findings below, the record reflects the court addressed his concerns, both in its second ruling and at the hearing on David's objection to the decree lodged by Kimberly. Because David did not challenge the sufficiency of the findings in the final decree or make the same arguments below that he raises on appeal, he has waived the arguments on appeal. *Id.*

¶9 David's claims lack merit in any event because the trial court made findings pursuant to § 25-319(B)(4), (5), and (9) in the summary sheet attached to its first ruling and confirmed those findings in its second ruling. With respect to David's ability to meet both his and Kimberly's needs under § 25-319(B)(4), the court found he had a net monthly income of $5,996 and monthly expenses in the amount of $4,238, leaving a surplus of $1,758 per month. As to § 25-319(B)(5), the comparative financial resources of the spouses, the court conducted a side-by-side comparison of the parties' incomes, finding that Kimberly earned twenty-one percent of their combined net income. And, as to § 25-319(B)(9), Kimberly's ability to meet her own needs, the court attributed her with

gross monthly income of $2,000, presumably based on her earning capacity.[3] Thus, the court considered § 25-319(B)(4), (5), and (9) in determining the amount of spousal maintenance to award Kimberly.

¶10 David suggests that under § 25-319(B)(9), the trial court also should have considered the proceeds from the sale of the residence and the retirement account proceeds Kimberly was awarded as part of the property division.[4] The record shows the court divided the community property evenly, a substantial amount of the property awarded to Kimberly consisted of retirement funds, and both parties planned to use part of the funds to purchase new homes. Although § 25-319(B)(9) lists as a relevant factor the marital property apportioned to the party seeking spousal maintenance, that party "should not be expected to live off both the principal, and interest, exhausting whatever financial reserves [he or] she possesses." *Thomas v. Thomas*, 142 Ariz. 386, 391, 690 P.2d 105, 110 (App. 1984).

¶11 David also argues the trial court failed to consider his income based on the tax rate for a single individual and the tax implications of Kimberly's business in determining spousal maintenance. First, to the extent David is suggesting the court was required to make findings on these matters, we disagree. Although there may be tax

[3]Courts may consider the ability to earn, rather than actual earnings, in determining spousal maintenance. *Williams v. Williams*, 166 Ariz. 260, 266, 801 P.2d 495, 501 (App. 1990). Based on Kimberly's testimony that she provided daycare for six children, not including her two grandchildren, and charges $20 or $25 per day, the court reasonably could have concluded she had the ability to earn $2,000 per month.

[4]Although in his opening brief David relied on subsection (B)(5), he clearly was referring to (B)(9).

consequences arising from statutory factors, the tax consequences are not, standing alone, statutory factors. *Cf. Elliott*, 165 Ariz. at 134, 796 P.2d at 936 (court required to make findings regarding all statutory factors on which evidence was presented). Second, David did not argue at trial that his income should be considered in light of the tax rate for a single individual. This issue is therefore waived on appeal. *See Trantor*, 179 Ariz. at 300, 878 P.2d at 658. Moreover, the court heard conflicting testimony regarding the tax implications of Kimberly's business and implicitly rejected David's position on this issue. *See Imperial Litho/Graphics v. M.J. Enters*., 152 Ariz. 68, 72, 730 P.2d 245, 249 (App. 1986) (trier of fact weighs evidence and determines credibility of witnesses).

¶12 David next argues the amount of the spousal maintenance the trial court awarded Kimberly was not supported by the § 25-319(B) factors the court specified in its second ruling.[5] But, as we explained above, the court actually considered and made findings on several other § 25-319(B) factors in its first ruling. Because David's contention that the court's determination was based on only a few factors mentioned in the second ruling is incorrect, we necessarily reject this argument. We review the record, however, to determine whether sufficient evidence supports the court's indefinite spousal maintenance award of $2,100 per month.

[5]In support of his argument, David claims the trial court improperly cited community waste as a basis for the award of spousal maintenance when it already granted a separate judgment on that issue. David requested findings of fact and conclusions of law on both spousal maintenance and community waste. The trial court addressed both issues in the same ruling, but it did not actually cite community waste as a factor for the award of spousal maintenance. Therefore, we find no merit in this argument.

¶13 The trial court awarded spousal maintenance based on "the thirty year marriage duration with adult children, the age of the parties and the limited possibility of [Kimberly] gaining adequate employment to be fully self-sufficient, contribute to deferred compensation, purchase medical insurance and retire." The record supports these findings and the court's determination that the award should continue indefinitely. The parties' marriage undeniably was of long duration—nearly thirty years. *See Schroeder v. Schroeder*, 161 Ariz. 316, 320 n.5, 778 P.2d 1212, 1216 n.5 (1989); *see also* § 25-319(B)(2). At the time the marriage was dissolved, David was fifty years old and Kimberly was fifty-two years old. *See* § 25-319(B)(3). Kimberly spent most of her adult life as an in-home daycare provider, and as a result, she has not developed other employment skills. *See* § 25-319(B)(3), (5). Moreover, the court ordered that the duration of spousal maintenance was "modifiable." *See Schroeder*, 161 Ariz. at 323, 778 P.2d at 1219 (absent contrary language in decree, spousal maintenance awards may be modified on showing of substantial and continuing changed circumstances). Thus, we conclude the record supports the duration of the court's award of spousal maintenance.

¶14 We reach a different conclusion concerning the amount of spousal maintenance—$2,100 per month. The trial court stated it determined the amount as follows: "spousal maintenance is based on an estimate of a split of combined net income less Petitioner's net, rounded down to the nearest hundred."[6] According to the court, David had a net income of $5,996 per month and monthly expenses of $4,238, while

[6]Although the language of the court's mathematical basis is not clear, we presume the court (1) equally divided the parties' combined net incomes, (2) subtracted Kimberly's net income, and (3) rounded down to the nearest hundred.

Kimberly had a net income of $1,620 per month and monthly expenses of $3,569. The court's findings are supported by the record, including the parties' trial testimony and financial affidavits. And according to those findings, David had a monthly net surplus of $1,758, whereas Kimberly had a monthly shortfall of $1,949. But, the $2,100 award resulted in David having a monthly deficit of $342 and Kimberly having a monthly surplus of $151. David argues this result is "unjust" because it exceeds both Kimberly's needs and his ability to pay. We agree.

¶15 In awarding spousal maintenance, trial courts should strike a balance between "[t]he ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance." § 25-319(B)(4); *see also In re Marriage of Foster*, 125 Ariz. 208, 211, 608 P.2d 785, 788 (App. 1980). Section 25-319(B)(9) also provides "[t]he financial resources of the party seeking maintenance, . . . and that spouse's ability to meet that spouse's own needs independently" should be taken into consideration. Read together, these two factors suggest an award of spousal maintenance should not exceed the payee spouse's needs if the payor spouse cannot afford the excess amount. *See also MacMillan v. Schwartz*, 226 Ariz. 584, ¶ 30, 250 P.3d 1213, 1220 (App. 2011) (when modifying spousal maintenance, husband's increased income is not dispositive and court first should consider whether wife needs additional support to meet her needs); *Millington v. Millington*, 67 Cal. Rptr. 128, 146 (Ct. App. 1968) (award exceeding wife's needs can be justified only if husband "has income in excess of the sum of his needs and the basic amount necessary to meet those of the wife").

¶16 Despite having considered § 25-319(B)(4) and (9), the trial court awarded Kimberly more spousal maintenance than its calculations indicated she needed and more than David was capable of paying. We recognize that "[m]arital standard of living has long been listed by our legislature among the factors pertinent to the duration and amount of spousal maintenance." *Rainwater*, 177 Ariz. 500, 503, 869 P.2d 176, 179 (App. 1993). And although courts try to maintain the standard of living established during the marriage, this is limited by the payor spouse's ability to meet the needs of both parties. *See id.* at 503-04, 869 P.2d at 179-80. As a result, divorce often requires both spouses to maintain a lower standard of living than they enjoyed during the marriage. *Id.* Because the $2,100 spousal maintenance award exceeds both Kimberly's needs and David's ability to pay, we conclude the trial court abused its discretion. We therefore reverse the portion of the court's decree relating to the amount of spousal maintenance and remand for further proceedings consistent with this decision.

Attorney Fees

¶17 We decline Kimberly's request for attorney fees on appeal because she does not provide a legal basis for such an award. *Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, ¶ 24, 45 P.3d 1219, 1224 (App. 2002).

Disposition

¶18 For the reasons stated, we affirm in part, and reverse and remand in part.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge